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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1537

GLEN KING,
Petitioner

VERSUS

SHELBY RURAL ELECTRIC
COOPERATIVE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Subject Index

	Pages
Table of Citations	ii
Citation to Opinion Below	1
Jurisdiction	2-3
Question Presented for Review	3
Constitutional Provisions and Statutes Involved	3-5
Statement of the Case	6-9
Argument	9-13
Conclusion	14
Appendix A	1a-14a
Appendix B	1b

Table of Citations

Page

Associated Engineers, Inc., vs. *Job*,
370 F. 2d 633 ..... 6, 12-13

Buckhorn Coal & Lumber Co. vs. *Georgia Casualty Co.*, 222 Ky. 683, 2 S.W. 2d 383 11

Greene vs *Caldwell*,
170 Ky. 571, 186 S.W. 648 9

Hawkins vs. *Bleakley*,
243 U.S. 210 10

Kentucky Hotel vs. *Cinotti*,
298 Ky. 88, 182 S.W. 2d 27 9-10

Kentucky State Journal Co. vs. *Workmen's Compensation Board*, 161 Ky. 562, 170 S.W. 437 9

Kentucky Utilities Co. vs. *Jackson County Rural Electric Cooperative Corporation*,
Ky., 438 S.W. 2d 788 9

Middleton vs. *Texas Power & Light Co.*,
249 U.S. 152 10

Mountain Timber Co. vs. *Washington*,
243 U.S. 219 11

Seas Shipping Co., Inc., vs. *Sieracki*,
328 U.S. 85 13

Vires vs. *Dawkins Log & Mill Co.*,
240 Ky. 550, 42 S.W. 2d 721 11

Kentucky Revised Statutes, Section 342.055 5

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue from this Court to review the judgment of the Court of Appeals of Kentucky in the above-entitled cause.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky, printed in Appendix A hereto, is reported in 502 S.W. 2d 659.

Jurisdiction

This Petition for a Writ of Certiorari seeks review by this Court of the judgment of the Court of Appeals of Kentucky dated November 9, 1973, affirming the judgment of the Shelby Circuit Court on an appeal therefrom; which judgment of the Court of Appeals of Kentucky was entered on January 18, 1974, after denial of a Petition for Rehearing by Order entered on January 18, 1974.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257(3) upon the following grounds:

1. The validity of the Kentucky Workmen's Compensation Act, as applied by the Court of Appeals of Kentucky to shield one who has no obligations thereunder from common law tort liability to an injured workman employed and insured by another, is drawn into question as thereby being repugnant to the Fourteenth Amendment of the United States Constitution.

2. The privilege of a citizen of the United States to recover damages for personal injuries negligently inflicted by another — i.e., his immunity from injury without recompense — as guaranteed by the Fourteenth Amendment to the United States Constitution, is abridged by construction of the Kentucky Workmen's Compensation Act so as to insulate from tort liability one who has no obligation to provide workmen's com-

pensation benefits or insurance coverage to the injured workman.

3. The equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, is denied a citizen by construction of the Kentucky Workmen's Compensation Act in such manner as to deny an employee of an independent contractor the right to recover damages for personal injuries against one who contracts with his employer.

These are federal questions of substance which were decided in this case by the Kentucky Court of Appeals but which have not been heretofore determined by this Court; and the Kentucky Court of Appeals has decided such questions in a way probably not in accord with applicable or analogous decisions of this Court.

Question Presented for Review

The question presented for review is whether the Fourteenth Amendment to the United States Constitution secures to an injured employee of an independent contractor the right to recover damages from the contractor's employer, in spite of the fact that such employee is covered by workmen's compensation insurance carried by the contractor.

The Constitutional Provisions and Statutes Involved

The Constitutional provisions involved in this case are:

United States Constitution
Fourteenth Amendment

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Constitution

Section 14. "All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Kentucky Constitution

Section 26. "To guard against transgresion of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution shall be void."

Kentucky Constitution

Section 54. "The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

The statute involved in this case is:

Kentucky Revised Statutes

§342.055[1]. "Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against such other person to recover damages, or proceed both against the employer for compensation and such other person to recover damages, but he shall not collect from both. If the injured employee elects to proceed at law by civil action against such other person to recover damages, he shall give due and timely notice to the employer of the filing of such action. If compensation is awarded under this chapter, either the employer or his insurance carrier, having paid the compensation or having become liable therefor, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee."

1. In effect at the time of Petitioner's injury.

Statement of the Case

Shelby Rural Electric Cooperative Corporation (hereinafter called "Shelby") owns, operates and maintains a transmission system through which high voltage electricity is conducted and distributed in Shelby County, Kentucky. As a rural electric cooperative, it is required to adhere to the policies and standards of the Rural Electrification Administration of the federal government.

Electricom, Inc., (hereinafter called "Electricom") is a contractor engaged in the business of constructing utility transmission lines for electric and telephone companies.

With the approval of the REA, Shelby entered into a written contract with Electricom for construction work to be performed by the latter. This contract was drawn on a form furnished by the REA. Shelby and Electricom simply filled in the blanks with appropriate words and figures. They could not alter the terms recited in the form. The provisions of this contract appear to be identical with those of the contract construed by the Eighth Circuit in *Associated Engineers, Inc.*, vs. *Job* (CCA 8, 1966) 370 F. 2nd 633.

One of the projects assigned to Electricom was the conversion of an existing single-phase line to a three-phase 7200 volt line in order to provide service to a new school.

In contravention of the written contract, Shelby required that all work be done on energized lines so as

not to risk customer inconvenience. Furthermore, although the contract reserved to Shelby the right to supervise the work, Shelby exercised no supervision whatever with respect to safety. As its manager put it, ". . . we do not supervise them in any shape or form . . ."

Glen King had worked for Electricom for several years but his experience was limited to telephone line work, which differs from electric line work and is far less hazardous. Nevertheless, he was employed on this electric line conversion job. He was given no training by Electricom, but was simply told that he would learn as "he went along". His having been required to do the work in which he was engaged at the time of the accident, without appropriate training or experience, was negligence on the part of Electricom; as, by its Answer, Shelby admitted. Working with uninsulated high voltage conductors is dangerous; and there is a peculiar unreasonable risk of harm in working with energized high voltage electrical conductors unless some special precautions are taken. The failure of Electricom to take such special precautions was negligence; as, by its Answer, Shelby admitted.

So it happened that on October 26, 1967, Glen King was moving an energized line from one pole to another when he suffered serious electrical burns which necessitated the amputation of his left arm above the elbow and destroyed almost all of the muscle tissue of his right leg below the knee.

King brought this action against Shelby, alleging negligence on the part of Shelby itself and liability of Shelby for negligence on the part of Electricom in failing to perform non-delegable duties. Shelby answered, admitting that Electricom was indeed negligent as to two counts of the Complaint. It went on to set up defenses of general denial, sole negligence on the part of Electricom, and contributory negligence on the part of King. After discovery proceedings had been substantially completed, Shelby moved for a summary judgment. The motion was granted by the trial court without opinion or other recital of the basis of its decision.

King appealed to the Court of Appeals of Kentucky, presenting the question of whether Shelby was liable for the admittedly negligent conduct of Electricom and also for its own negligence in failing to perform duties required of it both under the common law and by its contract with Electricom. In its brief at that level Shelby argued that it could not be liable to King because he was covered under the Kentucky Workmen's Compensation Act as an employee of Electricom and, therefore, could not maintain an action against Electricom's employer. On oral argument in the Court of Appeals of Kentucky, counsel for King argued that Section 54 of the Constitution of Kentucky proscribes the extension of the "exclusive remedy" provision of the Workmen's Compensation Act to insulate from liability one who neither provides the workmen's compensation insurance n r is legally liable to do so. The Court of Appeals of Kentucky did not

so much as mention the constitutional provision in its Opinion, but held that the Workmen's Compensation Act shields Shelby from any claim by King against it.

On Petition for Researing before the Court of Appeals of Kentucky, King argued that the conclusion expressed in that Court's decision conflicts with not only Sections 14 and 54 of the Kentucky Constitution but also with the Fourteenth Amendment to the Federal Constitution. His Petition for Rehearing was overruled without comment.

Argument

Sections 14 and 54 of the Kentucky Constitution preserve to all persons injured in Kentucky the right to recover damages from those who cause the harm.

It was because of Section 54 of the Kentucky Constitution that the first workmen's compensation act adopted in Kentucky was invalidated. See *Kentucky Utilities Company* vs. *Jackson County Rural Electric Cooperative Corporation,* Ky., 438 S.W. 2d 788, 790, citing *Kentucky State Journal Company* vs. *Workmen's Compensation Board,* 161 Ky. 562, 170 S.W. 437.

Shortly thereafter, upon the premise that it applied only if the employee freely and voluntarily elected to trade his constitutional right of action against his employer for the surer benefits of the act, a second workmen's compensation act was held to be constitutional in *Greene* vs. *Caldwell,* 170 Ky. 571, 186 S.W. 648. Speaking of the Greene case in *Kentucky Hotel* vs. *Cinotti,* 298 Ky.

88, 182 S.W. 2d 27, the Court of Appeals of Kentucky said:

> ". . . we held the present Workmen's Compensation Act to be constitutional because an employee may by contract *elect* to waive the limitations upon recovery for injury." (Emphasis supplied)

This Court has recognized that the Kentucky Workmen's Compensation law is elective. In *Hawkins* vs. *Bleakley,* 243 U.S. 210, 212, speaking of the Iowa Workmen's Compensation Act, it was written:

> "As to private employers, it is an *elective* workmen's compensation law, having the same general features found in the recent legislation of many of the States, sustained by their courts. See . . . Greene vs. Caldwell, 170 Ky. 571 . . ." (Emphasis supplied)

And again in *Middleton* vs. *Texas Power and Light Company,* 249 U.S. 152, 160, this Court said:

> "In recent years many of the States have passed *elective* workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer . . Greene vs. Caldwell, 170 Ky. 571 . . ." (Emphasis supplied)

The Kentucky Workmen's Compensation Act has never required an employee to waive any constitutional

rights of action against any person other than his employer. On the contrary, his rights of action against others were the subject matter of KRS 342.055, which was in effect at all times material hereto. There is nothing in this case to suggest that Glen King freely and voluntarily waived his constitutionally guaranteed rights against those with whom Electricom contracted. To take away his rights, which persons other than Electricom's employees still enjoy, is to deny this Petitioner the equal protection of the laws.

Admittedly the Court of Appeals of Kentucky phrased its holding in terms of refusing to extend the nondelegable duties of one engaged in inherently dangerous work to the employees of its independent contractors; but, based as it was upon the grounds that such employees are covered by workmen's compensation insurance, the nature and effect of the decision is to extend the sanctuary of the Kentucky Workmen's Compensation Act to one who has no contract of any kind with the employee.

Furthermore, the employer of an independent contractor is in no way obligated by the Kentucky Workmen's Compensation Act to the employees of the independent contractor. It was said in *Vires* vs. *Dawkins Log & Mill Co.*, 240 Ky. 550, 42 S.W. 2d 721, 722, that:

> "It is settled that the principal is not liable under the Workmen's Compensation Law for compensation to the servants of an independent contractor."

See also *Buckhorn Coal & Lumber Company* vs. *Georgia Casualty Company*, 222 Ky. 683, 2 S.W. 2d 383. The

Kentucky court's rationale — that Shelby should have the employer's protection afforded by the Workmen's Compensation Act because "ultimately Shelby paid the premiums" for King's workmen's compensation insurance — is illusory. One could as well say that Shelby's customers ultimately "paid the premiums"; yet who would say that, if a drunk Shelby customer ran off the road and into the utility pole upon which Glen King was working, the customer would be insulated by the Workmen's Compensation Act from tort liability for injuries to King resulting from his negligence.

In *Mountain Timber Company* vs. *State of Washington*, 243 U.S. 219, 234, this Court said:

> ". . . it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him. . ."

In the same case, at page 237, the Court said:

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect."

The practical operation and effect of this decision of the Kentucky Court of Appeals is that Shelby gets the *quo* without parting with any *quid*, and this without any election on King's part that such be done. It is an abridgement of King's privileges and immunities.

While on the Eighth Circuit Court of Appeals, Mr. Justice Blackmun wrote the opinion in *Associated Engi-*

neers, Inc., vs. *Job* (CCA 8, 1966) 370 F. 2d 633. It was there held that under a contract between the RECC and an independent contractor, which in all particulars seems to be identical to the contract between Shelby and Electricom, the contractor's employee had a right of action against the RECC even though he was covered by workmen's compensation insurance carried by the contractor. The *Job* case is virtually identical to the case at bar in its legal principles and implications, albeit the result was contrariwise.

The rationale upon which the Petitioner rests his case here is analagous to that of this Court in *Seas Shipping Co., Inc.*, vs. *Sieracki*, 328 U.S. 85, in which a shipowner was held liable to an employee of its independent contractor even though the employee had rights of compensation under the Longshoremen's and Harbor Workers Compensation Act.

Conclusion

For the reasons set out above, the Petitioner respectfully submits that a Writ of Certiorari should issue to the Court of Appeals of Kentucky and that this case should be heard and decided by the Supreme Court of the United States.

Respectfully submitted,

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